

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

C/A No. 12-00456-jw

Adv. Pro. No. 14-80026-JW

Congaree Triton Acquisitions, LLC,

Chapter 7

Debtor.

Robert F. Anderson, as Chapter 7 Trustee for
Congaree Triton Acquisitions, LLC;

Plaintiff,

vs.

9002 Dunes, LLC;

FGSW, LLC;

Triton Partners Management Group, d/b/a
Triton Stone Management Group of Charlotte,
LLC, d/b/a Triton Stone Management, LLC,
d/b/a Triton Stone Group of Charlotte, LLC;

Triton Stone Group, LLC;

Triton Stone New Orleans, LLC;

Triton Stone of Charlotte, Inc.;

Triton Stone of Myrtle Beach, Inc.;

Triton Stone Southaven;

Carroll A. Campbell, III;

John D. Cattano;

Federico J. Gildemeister;

Inga R. Ivey;

Joshua L. Kessler;

Michella I. Williams;

Defendants.

This matter comes before the Court upon the Notice and Application for Settlement and Compromise (“Settlement Application”), filed July 2, 2014, by Robert F. Anderson, Chapter 7 Trustee (“Trustee”) in the Chapter 7 case of Congaree Triton Acquisitions, LLC (“Debtor”). The Settlement Application seeks approval of a settlement between the Trustee and Inga R. Ivey, Michella I. Williams, and 9002 Dunes, LLC of the causes of action asserted against them in the above-captioned adversary proceeding. Defendants Carroll A. Campbell, III and John D. Cattano filed an Objection (“Objection”). Following a hearing, the Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, which is made applicable to this proceeding by Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. On January 26, 2012, the Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, and thereafter continued to operate as a debtor in possession.
2. On June 29, 2012, the Court entered an order converting the Debtor’s case to a case under Chapter 7 pursuant to 11 U.S.C. § 1112(b) based upon, among other things, findings of gross mismanagement of the Estate, and the Trustee was appointed to the case.¹
3. On March 10, 2014, the Trustee filed the Complaint (“Complaint”), asserting causes of action related to the Debtor’s acquisition of substantially all of the assets of Triton Stone of Myrtle Beach, Inc. and Triton Stone of Charlotte, Inc. pursuant to an asset purchase agreement executed on or about March 11, 2011.
4. On April 3, 2014, the Trustee filed an Amended Complaint (“Amended Complaint”) adding Triton Partners Management Group, d/b/a Triton Stone Management Group of Charlotte, LLC, d/b/a Triton Stone Management, LLC, d/b/a Triton Stone Group of Charlotte, LLC; Triton Stone of Charlotte, Inc.; Triton Stone of Myrtle Beach, Inc. as Defendants. The

¹ Further references to 11 U.S.C. § 101, *et. seq.*, shall be by section number only.

Amended Complaint similarly asserts causes of action based upon the Debtor's acquisition of substantially all of the assets of Triton Stone of Myrtle Beach, Inc. and Triton Stone of Charlotte, Inc. pursuant to the March 11, 2011 asset purchase agreement. In the Amended Complaint, the following causes of action are asserted against Inga R. Ivey ("Ivey"), and Michella I. Williams ("Williams"): equitable subordination, pursuant to § 510(c), of the unsecured proof of claim filed by Ivey against the Estate in the amount of \$1,525,000, which is based on a promissory note assigned from 9002 Dunes to Ivey; unlawful distributions pursuant to § 541 and S.C. Code Ann. §§ 33-6-400, 33-8-330 against Williams; unlawful distributions pursuant to § 541 and N.C. Gen. Stat. Ann. §§ 55-6-40, 55-8-33 against Williams; breach of fiduciary duty against Williams pursuant to § 541; constructive fraud against Williams pursuant to § 541; and unjust enrichment Williams pursuant to § 541. No direct causes of action were asserted against 9002 Dunes, LLC ("9002 Dunes") in the Trustee Amended Complaint.

5. On April 24, 2014, Campbell and Cattano filed an amended complaint ("State Court Amended Complaint") in the Richland County Court of Common Pleas ("State Court") in case number 2014-CP-400-1515 ("State Court Action"), seeking to recover against Triton Stone Group, LLC; Triton Stone Management, LLC; Triton Stone Southaven, LLC; Joshua Kessler; Randy Mathis; Gary Sena; Triton Stone Group New Orleans, LLC; Christian Jensen; Jack Jensen; Triton Stone of Charlotte, Inc.; Triton Stone of Myrtle Beach, Inc.; FGSW, LLC; 9002 Dunes, LLC; Natural Stone Holdings, LLC; Federico Gildemeister; and Michella Williams. Two separate motions to dismiss the State Court Amended Complaint were subsequently filed, and Cattano and Campbell filed objections to the motions to dismiss on or about May 22, 2014.

6. On July 2, 2014, the Trustee filed the Settlement Application with Ivey, Williams, and 9002 Dunes, LLC (collectively, the “Settling Defendants”). The Settlement Application explained that a settlement with the Settling Defendants was pursued after considering and evaluating the anticipated defenses to the claims brought against the Settling Defendants in the Amended Complaint; the uncertainty of success on the merits of those claims; the fees, costs, and delay of litigation; and the benefits from the Settlement to the Trustee’s other claims asserted in the Trustee Amended Complaint resulting from Williams and Ivey’s agreement to, among other things, serve as fact witnesses in the Adversary Proceeding. The Settling Defendants denied any liability as to the causes of action asserted against them in the Amended Complaint.

a. The terms of the Settlement are summarized as follows:

- i. The Settling Defendants will pay the estate an aggregate sum of \$5,000.00 (“Settlement Amount”) within five (5) business days of the order approving the Settlement becoming a final order;
- ii. Ivey’s claim will be equitably subordinated pursuant to § 510(c) to other allowed general unsecured claims and would be paid *pro rata* with any other allowed subordinated general unsecured claims only after distributions in accordance with § 726 are completed to allowed general unsecured creditors set forth in § 726(a)(1) to (5);
- iii. Upon receipt of the Settlement Amount, the Trustee will immediately file a notice of dismissal of the settled causes of action against the Settling Defendants in the Adversary Proceeding with prejudice;

- iv. The parties will execute the specified releases on the one hand of the Settling Defendants and of the Trustee on the other;
 - v. The Settling Defendants will provide the Trustee with access to records and information relating to the Adversary Proceeding in the Settling Defendants' possession, custody, or control and (B) will be available as fact witnesses in connection with the Adversary Proceeding; and
 - vi. The Trustee and the Settling Defendants will keep the terms of settlement and negotiations confidential other than as required to obtain Court approval or as otherwise ordered by a court of competent jurisdiction.
7. On July 21, 2014, Cattano and Campbell filed the Objection, arguing that the equitable subordination of the Ivey Proof of Claim would result in no benefit to the Estate; that any benefit of Ivey and Williams serving as fact witnesses was "absurd"; the Trustee, by entry into the Settlement, was attempting to "abrogate his responsibilities and abandon the estate's claims against [the Settling Defendants] for next to nothing"; and the Trustee's actions in proposing the Settlement, "at best, represent a complete waste of time and resources for a lot of people" and "at worst would be an abuse of the judicial process and a miscarriage of justice."
8. On August 5, 2014, the Trustee filed his Reply to the Objection, asserting that the Settlement fell well within the range of reasonableness required by Fed. R. Bankr. P. 9019.
9. On August 11, 2014, the Court conducted a hearing on the Settlement Application and the Objection.

CONCLUSIONS OF LAW

In the Objection, Cattano and Campbell question the propriety of the Trustee's proposed Settlement with the Settling Defendants. However, after careful consideration of the Settlement Application and related pleadings, the testimony, evidence, and arguments presented at the hearing, the Court concludes that the Settlement should be approved.

I. Analysis of the Settlement

Federal Rule of Bankruptcy Procedure 9019(a) allows the settlement of a matter with the approval of the Court after notice and a hearing. "The essential inquiry that the Court must make . . . is to determine whether the settlement agreement is 'fair and equitable' and in the best interests of the estate." In re Derivium Capital, LLC, 380 B.R. 392, 405 (Bankr. D.S.C. 2007) (quoting United States ex rel. Rahman v. Oncology Assocs., P.C. (Oncology Assocs.), 269 B.R. 139, 149–150 (D. Md. 2001), aff'd sub nom, United States ex rel. Rahman v. Colkitt, 61 Fed. Appx. 860, 2003 WL 1735258 (4th Cir. April 2, 2003)). Settlements are to be encouraged, and it should not be the intention of a court to discourage settlements. Oncology Assocs., 269 B.R. at 149 (citations omitted). The approval of a settlement pursuant to Fed. R. Bankr. P. 9019 is within the sound discretion of the bankruptcy court. See St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1010 (4th Cir. 1985); see also EEE Commercial Corp. v. Holmes (In re ESI Reactivation, Inc.), 934 F.2d 1315, 1323–34 (4th Cir. 1991) (citing Vaughn). "A Court may approve a settlement over objections unless the proposed settlement falls below the lowest point in the range of reasonableness." Derivium Capital, 380 B.R. at 405 (quoting In re Jaraki, No. 04-09182, 2006 WL 2612198, at *3 (Bankr. D.S.C. Jan. 20, 2006))

When evaluating a proposed settlement, a bankruptcy court generally considers the following four factors: "the probabilities of success in litigation; the difficulties, if any, to be

encountered in the matter of collection; the complexity of the litigation involved (including the expense, inconvenience and delay necessarily attending the litigation); and the paramount interest of the creditors and a proper deference to their reasonable views.” Derivium Capital, 380 B.R. at 405 (collecting cases). The Court concludes that these factors are satisfied as follows:

A. Probability of Success in Litigation

The record reflects that the Settling Defendants are represented by competent counsel and have raised several potentially viable defenses to the causes of action asserted against them by the Trustee. The Trustee also reported that the Settling Defendants had advised him of their intent to file a Motion to Dismiss the Amended Complaint when their responsive pleadings became due. As part of the settlement, Williams and Ivey have agreed to serve as cooperative fact witnesses, which the Trustee asserts will improve his probability of success on the remaining causes of action in the Amended Complaint against other defendants in the Adversary Proceeding.

Cattano and Campbell argue that any benefit from Williams and Ivey serving as fact witnesses is “absurd” because the Trustee could issue a subpoena or otherwise compel testimony from these witnesses as “fact witnesses” and if placed under oath, one would expect Williams and Ivey to tell the truth regardless of the Settlement. In response, the Trustee testified that based on his experience, a cooperative witness is much more effective at trial in the presentation of a case than a compelled witness and that Williams and Ivey’s cooperation will assist him in investigating and proving the remaining causes of action in the Amended Complaint. Considering the possibility of the Settling Defendants being successful in their motions to dismiss and defenses to the Amended Complaint, the Trustee asserts that the settlement with these defendants is the better course of action. The Trustee also emphasized that in negotiating

the Settlement, the Trustee and the Settling Defendants negotiated the terms of the Settlement at arm's length and without collusion. See e.g., Official Committee of Unsecured Creditors v. White Plains Joint Venture (In re Bond), No. 93-1410, 16 F.3d 408, 1994 WL 20107, at *3 (4th Cir. Jan. 26, 1994) ("Thus, when a proposed settlement offers benefits to the estate at the time the parties enter into the agreement, we think a bankruptcy court does not abuse its discretion by deferring to the business judgment of the parties who negotiated the compromise, especially when the parties negotiated at arm's length and there is no hint of collusion.")

For these reasons, this factor weighs in favor of the Court's approval of the Settlement.

(B) Difficulties to be Encountered in Collecting any Judgment

The Trustee presented evidence indicating that Williams appeared to lack potential assets from which to collect any judgment rendered against her in the Adversary Proceeding and that the probability of the collectability of a judgment against Williams was low compared to the other defendants to the Adversary Proceeding. The Trustee demonstrated that he has substantial knowledge and experience from his forty year career as a Chapter 7 panel trustee in determining the collectability of judgments. Since the only relief sought against Ivey was the equitable subordination of her proof of claim and that claim constituted a substantial percentage of the total claims filed against the Estate, the Trustee explained that the settlement and the equitable subordination of Ivey's claim created a greater likelihood of larger distributions to the Estate's unsecured creditors in the event of a recovery in the Adversary Proceeding. In addition, the Trustee asserted that the settlement benefits the Estate by obtaining a portion of the relief sought against Ivey without the Trustee incurring any additional litigation expenses. Cattano questioned the Trustee regarding certain assets of Williams and 9002 Dunes that could be used to satisfy a judgment, but did not produce evidence of any specific assets of significant value currently in

existence. The Trustee clarified that even though 9002 Dunes was named as a defendant in the Amended Complaint, no direct causes of action were asserted against it.

Thus, the Court determines that this factor also weighs in favor of approval of the Settlement.

(C) Complexity of Litigation and Expense, Inconvenience, and Delay

The Trustee has asserted numerous claims in the Amended Complaint to which numerous defenses have been raised. To date in the Adversary Proceeding, the Trustee has defended against three motions to dismiss the Trustee Amended Complaint. In the course of defending these motions to dismiss, the Trustee asserts his counsel were required to undertake approximately 143 hours of work, which resulted in approximately \$24,730.00 of attorneys' fees. Discovery has not yet been completed and a significant amount of work is anticipated before the parties will be ready for trial. When considering the complexity of litigation and expense, inconvenience, and delay factor in settlement negotiations, the Trustee asserts that he puts a great deal of emphasis on his duty to keep fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors. See Alabama Surface Mining Commission v. N.P. Mining Co. (In re N.P. Mining Co.), 963 F.2d 1449, 1454 (11th Cir. 1992) (stating that an "overriding concern in the [Bankruptcy] Act [is] with keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for creditors.") (quoting Otte v. United States, 419 U.S. 43, 53, 95 S. Ct. 247, 254, 42 L.Ed.2d 212 (1974)).

At the Hearing, Trustee's counsel explained that during settlement negotiations, the Settling Defendants indicated their intent to file a motion to dismiss the causes of action asserted against them in the Amended Complaint. The Trustee considered this information and

determined that defending another motion to dismiss the Amended Complaint would be time-consuming, expensive, and further delay discovery. Accordingly, the Trustee asserts that the Court should find the Settlement Application is in the best interests of the Estate based upon following:

- (1) the limited resources of Williams;
- (2) 9002 Dunes was not named directly in the Trustee Amended Complaint;
- (3) the fact-intensive nature, complexity, and disputed nature of the settled causes of action;
- (4) the benefit to the Trustee's investigation from Ivey and Williams' participation as cooperative fact witnesses;
- (5) the Trustee obtaining the requested relief in the cause of action asserted against Ivey without incurring additional litigation expenses; and
- (6) the avoidance of expenses associated with defending yet another motion to dismiss.

The Trustee further contends that the Settlement will allow the Adversary Proceeding to proceed expeditiously while simultaneously limiting allowable administrative expenses arising from the Adversary Proceeding.

Cattano and Campbell argue that the settlement should not be approved because it fails to redress the wrongdoings of the Settling Defendants, including that they benefitted from unlawful distributions in the amount of \$392,000.00, which should be returned to the Estate. They further argue that the Settling Defendants should be held liable for general damages for fraud and that the promissory note at issue, which was personally guaranteed by Cattano and Campbell, should be "rescinded, voided, and nullified in its entirety because of the egregious conduct of [the Settling Defendants]."

At the Hearing, Cattano testified that that he and Campbell were being sued in State Court by Ivey on account of their guarantees of the promissory note. Cattano also affirmed that he and Campbell were raising similar arguments to those raised in the Objection in the action pending in State Court. Thus, it appears that the State Court remains an available forum for Cattano and Campbell to redress these issues.

“[W]hen considering reasonableness, there is no best compromise, only a range of reasonable compromises. So long as the one before the court falls within the range, it may be approved.” Cockhren v. MidWestOne Bank (In re Cockhren), 468 B.R. 838 (B.A.P. 8th Cir. 2012) (internal quotations omitted) (quoting PW Enterps., Inc. v. Kaler (In re Racing Servs., Inc.), 332 B.R. 581, 586 (B.A.P. 8th Cir. 2005)). Based upon the evidence presented, the Court determines that the Settlement falls well within the range of reasonableness and this factor weighs in favor of approval of the Settlement.

(D) Interests of Creditors

The Trustee asserts that the Court’s approval of the settlement is in the best interests of the Estate’s creditors. As discussed above, in addition to the Settlement Amount, the settlement provides for the equitable subordination of Ivey’s claim, which creates a greater likelihood of larger distributions to the Estate’s unsecured creditors in the event of a recovery in the Adversary Proceeding. In addition, the cooperation of Ivey and Williams as witnesses and as sources of records and other information will likely improve the Trustee’s chances of recovery on the remaining causes of action for the benefit of creditors of the Estate. No objection to the Settlement Application or Settlement has been filed by any creditor of the Estate. Cattano and Campbell concede that they are “not ‘creditors’ of the Debtor and have never filed a proof of

claim in the bankruptcy proceeding. . . ” and therefore do not have an expectation of distribution from the Trustee.

Furthermore, while Cattano and Campbell, who have filed the only objection, do not appear to be entitled to notice under Fed. R. Bankr. P. 2002(a)(3), the Court has nevertheless considered the Objection in its determination of whether the settlement is fair and equitable and in the best interests of the Estate. See Derivium Capital, 380 B.R. at 405 (discussing Fed. R. Bankr. P. 9019 (a) requires the Court to evaluate whether “the settlement agreement is ‘fair and equitable’ and in the best interests of the estate”). In addition, the absence of an objection from any creditor, including the Estate’s largest creditors, also weighs in favor of a finding that the settlement is in the best interests of the creditors.

Consequently, the Court finds this factor also weighs in favor of approval of the settlement.

CONCLUSION

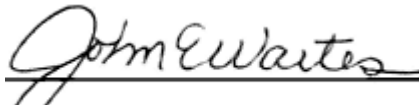
For the foregoing reasons, the Court concludes that the settlement is fair and equitable and in the best interests of the Estate. Accordingly, the Objection is overruled and the Settlement Application is approved.

AND IT IS SO ORDERED.

**FILED BY THE COURT
09/12/2014**



Entered: 09/12/2014


US Bankruptcy Judge
District of South Carolina